Center for Military Readiness
– Policy Analysis –

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Congressional Indifference Triggers Court Ruling to "Draft Our Daughters"

On February 22, **Texas** federal **District Judge Gray H. Miller** declared that the law requiring young men to register with **Selective Service** for a possible future draft was unconstitutional. The non-binding ruling favored the **San Diego**-based **National Coalition for Men (NCFM)**, which claimed that registration requirements and non-compliance penalties for men-only violate men's equal protection rights.

Judge Miller's 19-page opinion faulted the government for not making a credible case for exempting women from **Selective Service**, now that the rules affecting women have changed.[1] This ruling could have been avoided, however, if **Congress** had made a record documenting concerns about the previous administration's rule changes regarding military women in direct ground (infantry) combat.

Both political parties share the blame. The Republican-controlled Congress failed to challenge the **Obama Administration**'s policies in 2015, and the **Trump Administration** has not reviewed or revised them since taking office in January 2017. These failures to provide oversight or to take responsible action made it more difficult for the **Department of Justice** to defend the **Military Selective Service System (MSSS)** and the underlying law.

The government cannot submit new arguments based on relevant facts if Congress did not consider those facts important enough to examine at public hearings or to act upon in law. If the government had been able to cite a clear legislative record in court, the case in defense of the Selective System would have been stronger and it might have prevailed.

Still, the defendants presented strong arguments before the court. Among other things, the government correctly noted that Congress had retained the **Military Selective Service Act (MSSA)** even after the Obama Administration changed the rules regarding women in direct ground combat in December 2015. Congress could have voted to abolish the MSSA or to include women in registration, but instead it established a national commission to review all options and to make recommendations by March 2020. [2]

The government maintained that the court should not rule on the issue until the commission process is complete, and that decisions regarding military mobilization in times of crisis should be made by the political branches, not federal judges. [3] The Legislative and the Executive branches have the responsibility to make policy for the military.

Missing Oversight on Women in Combat

In December 2015 then-Secretary of Defense **Ashton Carter** announced that all close combat units, including the **infantry**, would be open to minimally-qualified women on the same involuntary basis as men. Carter's sweeping orders disregarded the best professional advice of then-**Marine Commandant General Joseph Dunford**, who had exercised his option to ask for exceptions for the infantry and **Special Operations Forces**. [4]

General Dunford backed his request with empirical data and findings resulting from three years of scientific research comparing the effectiveness of men and women in simulated ground combat. Defense Secretary **Ashton Carter** nevertheless denied Dunford's formal request, and documents setting forth the rationale behind it were withheld from public view. [5]

Despite repeated requests from the **Center for Military Readiness**, both before and after policies changed, leaders of the Republican-controlled **House** and **Senate Armed Services Committees** refused to disclose General Dunford's request for exceptions or to conduct public oversight hearings on scientific research that remains relevant today. Inconvenient truths remain true even if the government ignores it them.

The Trump Administration also has failed to review and revise women-in-combat policies using the same executive power that the previous administration did. In fact, four decades have passed since either political party showed true support for women by recognizing the harmful consequences of treating women like men in direct ground combat units such as the infantry. These fighting teams, which attack the enemy with deliberate offensive action, have missions going beyond the experience of being "in harm's way." [6]

The most current, reality-based data confirming physical differences between men and women must be included in any serious discussion of readiness to mobilize if it ever becomes necessary to reactivate Selective Service and a possible future draft. There are no good reasons for keeping key facts under wraps, but there are excuses:

1) Evidence of physical differences affecting the performance of men and women in combat does not fit **feminist ideology** and theories about **gender equality**.

2) **Key findings** resulting from USMC field tests – some of which were omitted from the official Defense Department list of relevant studies – contain **empirical data** that discredit politically-correct narratives.

3) Publicly discussing reality-based research comparing male and female physical capabilities would raise the ire of congressional feminists and spark major **pushback** from the **political left**.

None of these excuses are valid. Elected members of Congress have a duty to conduct responsible oversight on issues that affect military women and the men with whom they serve.

What the Court Did Not Hear

Given the limited facts presented in court, the Texas judge accepted at face value unchallenged Defense Department policies regarding women. He applied **"equal protection"** principles to the Selective Service System, and did not consider recent research findings relevant to what should have been the key question: *How would inclusion of women in Selective Service improve readiness to mobilize the military in the event of a catastrophic national emergency?*

Had the judge applied the **"rational basis"** standard that the Supreme Court has used in previous similar cases, he may have upheld the MSSA as constitutional, even after the change in women-in-combat policies. Instead, the judge extravagantly claimed in a footnote, "The average woman could conceivably be better suited physically for some of today's combat positions than the average man . . . and "combat roles no longer require sheer size or muscle" [7]

Scientific research done by the Marine Corps' would have disproved the judge's unsupported speculations, but the court was only reviewing the constitutionality of women-in-combat policy changes, which Congress has allowed to remain in place without challenge.

The government cited a landmark **Supreme Court** ruling, ***Rostker v. Goldberg*** (1981), which recognized the purpose of registration: to prepare for the **contingency** of a future draft of combat troops. At that time, women were exempt from close combat units.

The *Rostker* decision upheld the all-male Selective Service registration requirement because men and women were not "similarly situated" for purposes of registration for a draft. In the NCFM case, the judge concluded that under women-in-combat policies that Congress and the Trump administration have left unchallenged, both men and women are now "similarly situated" in terms of eligibility for the combat arms.

This has happened even though the **National Defense Authorization Act for 2017 (NDAA)** recognized that the "current focus" of a possible future draft would be on "mass mobilization of primarily combat troops" – not support units where women have always volunteered to serve. [8]

Congress must recognize the harmful consequences of registering women for a possible future draft into the combat arms, since research has confirmed that in direct ground combat, **women do not have an equal opportunity to survive, or to help fellow soldiers survive.**

Co-Ed Combat in the Real World

These are a few of the findings that were *not* presented to the court, due to Department of Defense and congressional efforts to stuff them down the Orwellian Memory Hole. For several reasons summarized here, physical differences between men and women are still highly relevant to the debate about Selective Service:

- In the event of a catastrophic national emergency beyond the capabilities of the **All-Volunteer Force**, the Selective Service System would not be re-activated unless there were an extraordinary need for **"replacements"** in the combat arms.

- In tasks simulating requirements of **infantry**, **armor**, and **artillery** units, all-male teams outperformed gender-mixed units in **69%** of ground combat tasks (**93 of 134**).

- Gender-related physical deficiencies negatively affected gender-mixed units' **speed and effectiveness** in simulated battle tasks, including **marching under heavy loads**, **casualty evacuations**, and **marksmanship** while fatigued.

- Women's comparative disadvantage in upper- and lower-body strength resulted in **higher fatigue levels**, which contributed to greater incidents of **overuse injuries** such as stress fractures.

- During the USMC field test assessments, **musculoskeletal injury rates** were roughly **double** for females. (**40.5%** compared to **18.8%** for men).

- During research at the **Infantry Training Battalion (ITB)**, enlisted females were injured at more than **six-times** the rate of their male counterparts. (**13% vs. 2%**).

- In some gender-mixed groups showing no significant differences in performance, "**male compensation enabled integrated teams to compete at the same level as their all-male counterparts."** In field test squads with one or more women, male Marines almost always did the heaviest work. [9]

These findings and many more confirmed unchanging physical differences between men and women that are likely to make gender-mixed direct ground combat units less strong, slower, and less lethal during missions to aggressively attack, fight, and kill the enemy.

The Federal courts should not be expected to decide whether women are as capable as men in combat – that is the job of Congress and the President. However, the judge in this case erred in gratuitously concluding that the time to debate the issue has passed. An informed national debate about this national security issue has not even begun.

Co-Ed Conscription Would Weaken Selective Service

The Texas district court discussed the controlling 1981 *Rostker v. Goldberg* precedent, which upheld Congress' right to register only men for Selective Service. At that time, it was not necessary for Congress to delve into underlying issues, such as physical disparities between men and women. Because women were ineligible for the combat arms, *Rostker* was an easy call to make.

When Defense Secretary Carter made women eligible for ground combat units on the same involuntary basis as men, the most obvious legal premise behind the *Rostker* decision vanished. It is significant, however, that a formal Defense Department notice, sent to Congress after the rule change said, "The Court in *Rostker* **did not explicitly consider whether other rationales underlying the statute would be sufficient to limit the application of the MSSA to men**. (emphasis added) [10]

Successful legal defense of "other rationales" to continue women's exemption from Selective Service registration would require a record focusing on facts that are relevant to military readiness, not egalitarian goals.

The Importance of Making a Case Based on Facts

The Military Selective Service Act is a relatively low-cost insurance policy. Congress wrote the law to provide for the rapid induction and training of sufficient numbers of civilians capable of replacing casualties fighting in a major national emergency.

In April 2016, a **CMR Policy Analysis** set forth numerous reasons why physical differences between men and women could fully justify continued exemption of women from Selective Service, [11] which are summarized here:

- If **"equal protection"** is the goal, any call-up of men ages **18-26** for military service would have to include **equal** numbers of young women.

- If the draft were reinstated, ***some*** women might meet minimal qualifications, but that would not be a good reason for subjecting ***all*** women to Selective Service mandates.

- Emergency induction systems would have to divert **scarce time and resources** to locate, evaluate, and train **thousands of women -- just to find the few** who might be minimally qualified for the combat arms.

- Jamming the Selective Service System during a time of crisis, instead of concentrating on men who can be rapidly trained to fight in physically-demanding ground combat units, would create a **political crisis** and a **paralyzing administrative overload** at the worst possible time. [12]

The CMR Policy Analysis quoted Professor Emeritus **William A. Woodruff**, a former Army Colonel and Judge Advocate General, who explained the importance of maintaining sound Selective Service policies and principles in a time of national crisis:

> "[T]he question is whether **the expenditure of time, effort, and resources** to cull from the thousands of women who would be drafted **the few who might meet the demanding standards** required of combat units, and enter the casualty replacement stream, is a wise use of time, effort, and resources during a time of national mobilization where **the very survival of our nation depends upon success on the battlefield**.
>
> "Congress could reasonably, rationally, and appropriately decide that even though women who can meet the high standards of combat positions can **volunteer** and serve in those positions, the physiological reality is that **most women cannot meet those standards** while, physiologically, most men can.
>
> "In light of that reality, Congress could decide that in a period of national mobilization, when time is of the essence, when the blood of our soldiers is being spilled on the field of battle, when the situation is so grave that we must abandon the all-volunteer principle that produced the greatest military force in the history of the world, **we simply cannot afford to devote time and resources to identifying those few women who may qualify**.
>
> "This is especially true in light of the fact that those women who can qualify and who wish to serve are free to volunteer to do so. Excluding the remainder from the draft eligible pool is an exercise in **reasoned judgment to provide for the national defense in a time of crisis**, not unlawful gender discrimination. . ."

Professor Woodruff added,

> "If **75%** of the men can meet the combat standards but only **25%** of the women can meet the same standards, considerably more time, effort, and resources would be expended in testing, evaluating, and screening women to identify the 25% who qualify. Congress may well determine that in a time of national emergency, devoting resources to a demographic where **three-fourths of the members will be unqualified** hinders the ability to efficiently screen [potential draftees.]"

Research suggests that including women in the draft pool could *reduce* the flexibility, efficiency, and speed necessary to respond to a national crisis. In a court of law, however, it is necessary to support all assertions with fact-based evidence that would counter any suspicion of cultural bias.

Determinations of who and what characteristics make up a lethal fighting force are assigned to the political branches of government, not the Judicial branch. The Executive branch under President Obama (**Article II**) decided that assigning women to combat MOSs furthered "equality," if not "combat lethality."

Congress has **Article I** powers to challenge the previous administration's "no exceptions" women-in-combat mandates, but because it has not done so, the government could not present evidence that would have justified continued exemption of civilian women from Selective Service obligations. [13]

In effect, the Texas district judge hearing the NCFM case deferred to the military judgment of the political branches and accepted their determination that women are just as effective in combat positions as men. Because the Executive and Legislative branches ignored research findings, evidence to the contrary was not presented in court.

As a result, the judge found no legal justification for continuing to register men only. This decision puts the responsibility squarely on the House and Senate Armed Services Committees to conduct a serious debate about the harmful consequences of treating women like men in the combat arms.

As a first step, Defense Department officials should produce all relevant information, so that a fully-informed discussion can begin. Both Congress and the next Secretary of Defense should enact policies that assign priority to military readiness, not "equal opportunity" or social considerations.

"Draft Our Daughters" Legislation Deferred to National Commission

The two male plaintiffs in the NCFM case, one of them a resident of Texas, argued that registering only men after their 18th birthday violates their constitutional rights. The court issued a non-binding declaratory judgment, not an injunction that would rewrite or nullify the Selective Service law. [14]

Now the ball is back in the court of Congress, which previously dropped the ball by allowing the Obama/Carter mandates to stand without challenge. In 2016 there was a heated debate about **"Draft Our Daughters"** legislation, however, which remains unresolved.

The House considered but ultimately rejected an amendment to the NDAA that would have included women in Selective Service. [15] At the same time, Armed Services Chairman **John McCain** sponsored legislation in the Senate version of the defense bill to impose **Selective Service** obligations on young women.

An uproar ensued, so Chairman McCain dropped that proposal in conference and substituted language establishing the 11-member **National Commission on Military, National, & Public Service**, and authorizing it to spend **$45 million** over **three years.** [16]

As CMR reported in 2018, Chairman McCain, a longtime advocate for mandatory national service, wrote the legislation in a way that allowed President Obama and liberal leaders in Congress to appoint most of the members.

Republicans named a few, but most have been associated with organizations that strongly favor Selective Service registration of women or mandatory national service in government-approved organizations, including the military. [17]

Now in its second year, the National Commission is seeking and compiling information for a report and recommendations for submission to Congress in March 2020. In the Texas case the government argued, "[P]ursuant to long-established principles of military deference, the Court should not short-circuit this process by acting before Congress has had an opportunity to consider the Commission's findings." [18]

National Commission Established to Promote Selective & National Service Agenda

In January 2019, the National Commission on Military, National, and Public Service released its **Interim Report.** The preliminary document briefly referenced different opinions on national service, but clearly suggested a serious push for proposals that, if implemented, would affect the lives of every young man and woman in America. [19]

A five-page February Staff Memorandum – the first in a series to be released in coming months – also suggested sweeping proposals that seem to be operating on two presumptuous beliefs:

a) Women would be equally effective in combat arms units if a draft were necessary, and

b) The government should be empowered to deprive young people of personal **freedom** for reasons other than national defense. [20]

The "national service" mission that Chairman McCain assigned to the commission requires close examination nationwide. In a Statement presented before members of the National Commission in November 2018, CMR President **Elaine Donnelly** maintained that the two issues should not be tied together. "Mandatory national service is not required to accomplish a tangential goal: women in Selective Service registration. Nor is gender-neutral Selective Service necessary to accomplish mandatory national service." [21]

This paragraph, which is excerpted from the National Commission's February Staff Memorandum, suggests Big Government mandates to ensure compliance:

> "**Punishments or sanctions for failing to meet a service requirement** could range from **ineligibility for government benefits or employment to fines or imprisonment.** The program could offer incentives such as **completion certificates**, educational benefits, preference in federal hiring, or even a tax-free award to every American **granted at birth and received by citizens after their service term.** Whatever means are in place to encourage **compliance**, a well-structured **mandatory service program** would require a **system to monitor participation**." (p. 5, emphasis added)

As CMR noted in its Statement for the Record of the Commission, we admire voluntary military service and community support activities. However, Big Government mandates and coercion such as this cannot be justified in the **"Home of the Brave and the Land of the Free."**

At times in our history, elected officials have found it necessary to conscript men to fight America's wars. The government, however, should not deprive anyone of their freedom for anything less than compelling reasons.

Congress should consider potential consequences of unjustified government coercion for "national service." Supposedly "voluntary" incentives would leave no real choice for young men and women but forced submission to some sort of government-run national service bureaucracy.

Unlike forced national service for civilian purposes, the ability to defend America under catastrophic attack remains the paramount concern. Regardless of what the National Commission recommends, the responsibility to

make decisions regarding the military resides with the elected branches of government. [22]

The debate must begin with a thorough, honest evaluation of the underlying issue, women in direct ground combat. Co-ed conscription is not a "women's rights" issue. It is a matter of national security that requires serious, overdue attention in the coming year.

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The Center for Military Readiness is an independent public policy organization that reports on and analyzes military/social issues. More information is available on the CMR website, www.cmrlink.org.

Endnotes

[1] Memorandum Opinion and Order, National Coalition for Men v. Selective Service System, U.S. District, Southern District of Texas Houston Division, Civil Action H-16-3362.

[2] Defendants' Memorandum in Support of Their Motion for a Stay of Proceedings and Summary Judgment, National Coalition for Men v. Selective Service System, No. 4:16-cv-3362. "During the 2016 debates over the NDAA, Congress had a wide range of proposals to amend the draft before it, including proposals that would have eliminated the draft entirely and that required the SSS to register women. But after considering these proposals, Congress chose not to enact them. Instead, Congress established the [National] Commission to receive input on these issues from all relevant stakeholders, study the matter, and make recommendations as to how to proceed." (p. 19)

[3] *Id.* "Plaintiffs have not presented any evidence that would undermine Congress's conclusion that the administrative burden of registering civilian females at large outweighs the benefit of being able to draft women quickly in times of crisis. But even if Plaintiffs had presented such evidence, it would not be this Court's place to substitute its judgment for Congress's contrary conclusion." (p. 23)

[4] Starting in 2013, the Obama Administration began the process of dismantling military women's exemptions from direct ground combat units such as the infantry. The U.S. Marine Corps instigated a three-year study that attempted to prove that women could be interchangeable with men in the combat arms, meaning fighting teams that attack the enemy with deliberate offensive action. At the conclusion of that **$38 million study**, which included nine months of scientifically-monitored field tests, then-Marine Commandant Gen. Joseph Dunford reportedly asked that infantry and Special Operations Forces remain all-male. Many of the research findings supporting that request are reported in the Statement for the Record that CMR submitted to the Senate Armed Services Committee on February 2, 2016.

[5] The Department of Defense list of Women in Service Studies did not include several documents obtained by some national newspapers and the Center for Military Readiness by means of FOIA requests, including this Memorandum for the Commandant, Subject: United States Marine Corps Assessment of Women in Service Assignments, August 18, 2015.

[6] Except for five minutes in 1993, the House has not had a public hearing examining the women in the combat issue since **1979**, forty years ago. And except for a brief session with Pentagon officials in February 2016, the Senate has not held a hearing on the issue since **1991**, 28 years ago.

[7] Memorandum Opinion and Order, Endnote #1, *supra*, p. 18.

[8] Defendants' Memorandum, endnote #2 *supra*, p. 4.

[9] These points summarize findings resulting from the nine-month **Ground Combat Element Integrated Task Force (GCEITF)**, which can be found in the CMR Statement for the Record of the Senate Armed Service Committee, cited in Endnote #4, *supra*, pp. 3, 8-10.

[10] Department of Defense: Detailed Legal Analysis: Selective Service.

[11] CMR Policy Analysis: Women, War, and Selective Service, April 2016.

[12] Law Professor Emeritus William A. Woodruff, Women, War, & Draft Registration, April 2016, pp. 4-5.

[13] According to Prof. Woodruff, once the combat restrictions on women were removed, the application of the equal protection component of the due process clause changed dramatically. Now men and women are "similarly situated" in a legal sense. The court was asked to determine whether the disparate treatment of men and women with regard to Selective Service and a possible future draft furthers an important government interest: a lethal fighting force. Congress failed to make a record recognizing concerns about the administrative difficulties of calling up thousands of draft-age women, most of whom would not meet qualifications for the combat arms. Clogging administration of the Selective Service system at the worst possible time would detract from readiness, not strengthen it. The court nevertheless deferred to the political branches' policy positions and did not second guess their decisions.

[14] A "declaratory judgment" is a form of relief wherein the court declares the rights of the parties to guide their future actions without ordering any damages or coercive relief. The declaratory judgment does not require government action to register women, but it does prevent adverse action against any of the plaintiffs for their non-compliance with the MSSA. Other courts are not bound by this decision, but they could easily adopt its rationale and rule accordingly. However, other non-party males who do not comply with MSSA requirements would run the risk of having another court reach a different conclusion, permitting adverse action to go forward.

[15] CMR: House, Senate Should Defeat "Draft America's Daughters" Legislation

[16] CMR: Senate Should Drop McCain Mandate to Register, Draft Women

[17] CMR: McCain Establishes National Commission Likely to Promote His Goals: "Draft America's Daughters" Registration and Mandatory Military, National, or Public Service

[18] Defendants' Memorandum, Endnote #2 *supra*, p. 12.

[19] National Commission on Military, National, & Public Service: Interim Report to the American People, the Congress, and the President, January 2019

[20] National Commission on Military, National, & Public Service, Staff Memorandum: Universal Service, February 2019

[21] Elaine Donnelly Statement for the Record – National Commission on Military, National, & Public Service, Nov. 15, 2018, p. 11.

[22] The context of the case is judicial review of an act of Congress – or in this case, failure of Congress to provide oversight of policies imposed by the previous administration. The Department of Justice, which was not free to cite evidence outside of congressional action, was handicapped in its efforts to defend the Military Selective Service law. Congress could still make a record of action that would justify continuing the male only draft, but the Department of Justice cannot create the record for them.